DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-49/53600

PRELIMINARY RECITALS

Pursuant to a petition filed May 23, 2002, under Wis. Stat. § 49.45(5) (1999-00) and Wis. Adm. Code § HA 3.03(1) (September 2001), to review a decision by the Portage County Health and Human Services Department (County) in regard to institutional Medical Assistance (MA), a Hearing was held on July 23, 2002 in Stevens Point, Wisconsin. A hearing scheduled for June 28, 2002 was rescheduled at petitioner's request.

The issue for determination is whether petitioner is precluded from making the arguments he now seeks to make.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner) (not present at July 23, 2002 hearing)	Torren K. Pies Attorney Anderson, Shannon, O'Brien, Rice & Bertz Attorneys At Law 1257 Main Street P.O. Box 228 Stevens Point, Wisconsin 54481-0228

Wisconsin Department of Health and Family Services
Division of Health Care Financing
Room 250
1 West Wilson Street
P.O. Box 309
Madison, Wisconsin 53707-0309

BY: Tricia Niemczyk, Elderly Services Specialist
Portage County Health & Human Services Department

Ruth Gilfry Human Resources Center
817 Whiting Avenue
Stevens Point, Wisconsin 54481-5292

OTHER PERSONS PRESENT:
petitioner's son and Power of Attorney (POA)
wife of petitioner's son (petitioner's daughter-in-law)
Christy Daley - State of Wisconsin, Board on Aging and Long Term Care, Long Term Care Ombudsman
Jim Rasmussen - Portage County Department on Aging, Benefit Specialist

ADMINISTRATIVE LAW JUDGE:
Sean P. Maloney
Division of Hearings and Appeals

All Exhibits cited in this Decision are from the July 23, 2002 Hearing.

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Portage County.

2. Petitioner applied with the County for institutional MA on March 7, 2000; the County denied petitioner's March 7, 2000 institutional MA application by a notice dated April 7, 2000; the County denied petitioner's application because it concluded that on November 8, 1999 petitioner divested farm homestead property with a value of $227,533 consisting of a house, outbuildings, and 131 acres. Exhibit #1.

3. On May 2, 2000 petitioner filed an appeal of the County's April 7, 2000 denial with the Division of Hearings and Appeals (DHA); that appeal was assigned appeal # MDV-49/44514 and a Hearing was held on June 19, 2000 during which petitioner was represented by an attorney; at that Hearing petitioner argued that November 8, 1999 divestment should not act as a bar to institutional MA eligibility because the property divested was given to petitioner's son and petitioner's son had provided care and support for petitioner that allowed petitioner to stay in his home (as opposed to a nursing home) for a longer period of time than he otherwise would have been able to. Exhibits #1, #3 & #4.

4. On August 29, 2000 DHA issued a Decision, dated August 29, 2000, concerning the County's April 7, 2000 denial; that Decision bears appeal # MDV-49/44514 and involves the same parties (petitioner and the County) as the present appeal (MDV-49/53600); Decision MDV-49/44514 concluded that the County properly denied petitioner's March 7, 2000 institutional MA application due to divestment. DHA Case No. MDV-49/44514 (Wis. Div. Hearings & Appeals August 29, 2000) (DHFS). Exhibits #1 & #3.

5. Decision MDV-49/44514 is a final judgment on the merits; petitioner did not ask for a rehearing of Decision MDV-49/44514 or appeal it to Circuit Court. Exhibit #1.

6. On May 8, 2002 petitioner again applied with the County for institutional MA; by a manual "Negative Notice" dated May 21, 2002 the County denied petitioner's May 8, 2002 application for institutional MA based on the divestment that had been upheld by Decision MDV-49/44514. Exhibit #3.

7. On May 23, 2002 petitioner filed an appeal of the County's May 21, 2002 denial with DHA; that appeal, which is the subject of this Decision, was assigned appeal # MDV-49/53600 and a Hearing was held on July 23, 2002; at the July 23, 2002 Hearing petitioner made the same argument he made at the Hearing for appeal # MDV-49/44514 but, in addition, also argued that November 8, 1999 divestment should not act as a bar to institutional MA eligibility because the divestment was not done with the intention or purpose of becoming eligible for institutional MA; petitioner did not make this second, additional, argument at the Hearing for appeal # MDV-49/44514 because he thought did not need an alternative argument since he thought his position was strong. Exhibits #4, #5 & #6.

DISCUSSION

The farm homestead property that was divested has been in petitioner's family since 1863 and has been handed down from generation to generation. Petitioner's only child, a son, as has been the family tradition, has lived on the farm virtually his entire life. He has lived in a mobile home on the farm almost continuously since 1964. He has put untold years of labor and toil over several decades into the farm with little direct monetary compensation. This labor and toil was evident in his hands at the July 23, 2002 Hearing, including the loss of part of one of his fingers. Additionally, petitioner's son has, over the decades, invested approximately $123,000 of his own money in the farm. Exhibit #5. Furthermore, petitioner's son and his wife have cared for petitioner since 1988 and it is their care that allowed petitioner to stay in his home on the farm for many years instead of going into a nursing home. Exhibit #4-D.

Petitioner and his son had every rightful expectation that the farm would be passed from petitioner to his son when the time came -- just as the farm had been passed from petitioner's parents to petitioner. That time came in November 1999. Tragically, it resulted in divestment.

Petitioner's appeal cries out for a remedy. If I could offer such a remedy I would readily do so. Unfortunately, I am constrained by the law and am unable to offer the remedy that is so obviously called for. I very much regret this.

The legal doctrine of claim preclusion (formerly known as "res judicata") provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. Ordinarily a final judgment is conclusive in all subsequent actions as to all matters which were litigated or which might have been litigated in the former proceedings. The following factors must be present:

(1) an identity between the parties or their privies in the prior and present suits;
(2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and,
(3) identity of the causes of action in the two suits.

Sopha v. Owens-Corning Fiberglas Corp., 230 Wis. 2d 212, 233-234, 601 N.W.2d 627 (1999); See also, *Northern States Power Co. v. Bugher*, 189 Wis.2d. 541, 550-551, 525 N.W.2d. 723 (1995).

As outlined in the above Findings of Fact, all of these factors are present in this case. Furthermore, petitioner was represented by an attorney in both the prior proceedings (MDV-49/44514) and the present proceedings (MDV-49/53600). Therefore, petitioner is precluded from making the arguments that he now seeks to make.

Exceptions to the doctrine of claim preclusion, confined within proper limits, may occur when the policies favoring preclusion of a second action are trumped by other significant policies. Claim preclusion is a principle of public policy applied to render justice, not to deny it. *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d at 236. This is a narrow exception to the doctrine and applies when a second action, through no fault of the person seeking the exception, is necessary in the interest of justice. Id., at 237-238.

Petitioner had the opportunity at the Hearing for MDV-49/44514 to make the arguments he now seeks to make. He was represented by an attorney in MDV-49/44514 and chose not make all of the argument he could only because he thought did not need an alternative argument since he thought his position was strong. Additionally, petitioner did not ask for a rehearing of Decision MDV-49/44514 or appeal it to Circuit Court. The reason for the need for a second action is the choices that were made by petitioner with the advice and counsel of an attorney. Petitioner chose not to make all the arguments he could have made in MDV-49/44514. Petitioner chose not to ask for a rehearing and chose not to appeal to Circuit Court. It cannot be said, therefore, that a second action is necessary through no fault of petitioner's.

CONCLUSIONS OF LAW

Petitioner is precluded, by the legal doctrine of claim preclusion, from making the arguments he now seeks to make.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby DISMISSED.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 12th day of August, 2002

/sSean P. Maloney
Administrative Law Judge
Division of Hearings and Appeals
89/SPM